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The Future of Classwide Punitive Damages

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THE FUTURE OF CLASSWIDE PUNITIVE DAMAGES

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Conventional wisdom holds that the punitive damages class action is susceptible not only to doctrinal restraints imposed on class actions but also to constitutional due process limitations placed on punitive damages. Thus, it would seem that the prospects for punitive damages classes are even grimmer than for class actions generally.

This conventional picture misunderstands the role of punitive damages and, in particular, the relationship between class actions and punitive damages. It either ignores or underestimates the distinctly societal element of punitive damages, which makes them especially conducive to aggregate treatment. Furthermore, punitive damages classes offer a solution to the constitutional due process problem of juries awarding "classwide" damages in a single-plaintiff case.

Courts' conceptualization of punitive damages as either individualistic or societal dictates how they decide the certification question. My survey of recent case law reveals that courts taking the plaintiff-focused individualistic view of punitive damages tend to deny class certification, while courts embracing the defendant-focused societal view are more likely to certify a punitive damages class, all else being equal. Therefore, the viability of the punitive damages class depends upon the persuasiveness of the societal conception of punitive damages.

Based on this empirical grounding, I discuss two possibilities for reform. First, state legislatures and courts could affirmatively define the collectivized, societal rationale for punitive damages. Such state legislative measures would likely withstand constitutional scrutiny under Philip Morris USA v. Williams, *given the U.S. Supreme Court's reaffirmation of the primacy of the state's role in defining the legitimate purposes of punitive damages. Second, federal courts—in the absence of definitive guidance from authoritative sources on state substantive law—could consider the underlying societal rationale for punitive damages in the course of their certification decisions. To do so would not only be permitted, but indeed warranted, by the Rules Enabling Act.*

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INTRODUCTION

In the realm of civil litigation, two features of "American exceptionalism" are under scathing attack: class actions and punitive damages.[1] The product of their combination—the punitive damages class action—is susceptible not only to the doctrinal restraints that have been imposed on class actions generally, but also to the constitutional due process limitations that have been placed on punitive damages. Thus, it would seem that the prospects for punitive damages classes are even grimmer than for class actions generally. Such is the conventional wisdom in the academy and, increasingly, in the courts.[2]

However, this conventional picture misunderstands the role of punitive damages and, in particular, the relationship between class

1. For a sampling of articles portending the death of the class action, see, for example, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH L. REV. 373, 375 (2005) ("[C]lass actions will soon be virtually extinct."); Symposium, *Class Action Rollback?* Wal-Mart v. Dukes *and the Future of Class Action Litigation*, 62 DEPAUL L. REV. (forthcoming 2013) (probing whether the death of class actions is nigh). For some representative articles foretelling the demise of punitive damages, see, for example, Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1302 (2005) ("The net effect of tort reforms has been to cabin and contain punitive damages by marginalizing the role of the jury."); Symposium, *Reforming Punitive Damages: The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469 (2001) (calling into question the future of punitive damages in the United States).

2. As Professor Francis McGovern summed it up, "[b]y most conventional wisdom, there is little future for plaintiffs or defendants who desire to resolve punitive damages claims globally using the procedural vehicle of a class action." Francis E. McGovern, *Punitive Damages and Class Actions*, 70 LA. L REV. 435, 435 (2010).

actions and punitive damages. First, as a general matter, punitive damages, unlike compensatory damages, have not only an individualistic element (focusing on the harms the plaintiff has suffered), but also a *societal* element (focusing particularly on the holistic harm caused by the defendant's conduct). This societal element of punitive damages makes them *more*, not less, conducive to aggregate treatment.

Second, there is an underappreciated link between the popular and judicial outcries over excessive punitive damages awards in individual cases and the specter of the class action. A decade ago, I characterized an emergent trend of multimillion (or billion) dollar punitive damages awards in single-plaintiff cases as the "poor man's class action"; in these cases, juries appeared to justify these sizeable awards based on widespread harms inflicted on people other than the actual named plaintiff.[3] If awarding "classwide" damages (framed as punitive damages) in a single-plaintiff case is what rankles, then the punitive damages class solves, rather than aggravates, the problem.

The Supreme Court has yet to address directly the viability of punitive damages classes.[4] However, in a trio of constitutional excessive punitive damages cases culminating in *Philip Morris USA v. Williams*, the Court clamped down on the ability of juries to *punish* a defendant on behalf of other harmed individuals who are not parties to the litigation.[5] In the wake of *Williams*, several notable scholars have sounded the death knell for classwide punitive damages.[6] However, this over-reads *Williams*, which admittedly

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3. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003) [hereinafter Sharkey, *Societal Damages*] ("*State Farm* represents an emerging paradigm in punitive damages cases: a single or multiplaintiff case in which, in effect, 'classwide' punitive damages are assessed on a statewide or nationwide scale." (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003))). *See generally id.* at 402–10.

4. Catherine M. Sharkey, *The* Exxon Valdez *Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 49 (2009) [hereinafter Sharkey, Exxon] ("The [Supreme] Court has yet to address the link between punitive damages and class actions.").

5. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (prohibiting juries from punishing for harm to nonparties); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422–23 (2003) (prohibiting juries from awarding punitive damages for a defendant's dissimilar acts); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996) (prohibiting juries from considering a defendant's lawful out-of-state conduct in determining the defendant's reprehensibility for purposes of a punitive damages award).

6. *See, e.g.*, Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1138 (2010) ("By casting punitive damages ultimately as punishment vis-à-vis the plaintiff—not anyone else—the [*Williams*] Court arguably constitutionalizes a kind of divisible characterization for that remedy. On this view, punitive damages would be no more amenable to class treatment than demands for the prototypical divisible remedy of compensatory damages."); Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 884 (2008) ("*Philip Morris*

emphasizes an individualistic notion of retributive punishment, to squelch not only societal *retributive* conceptualizations of punitive damages but also societal *non-retributive* rationales such as economic deterrence, aimed at forcing the defendant to internalize the full costs of its actions.

In this Article, I argue that the certification of punitive damages classes hinges on courts' appreciation of the societal role or purpose of punitive damages. Part I puts forth my central claim that courts' conceptualization of punitive damages as either individualistic or societal is dispositive on the certification question. First, I stake out the normative claim that, apart from the more conventional individualistic and retributive purposes, punitive damages may fulfill a non-retributive societal goal of economic deterrence or loss internalization. Next, I provide some empirical backing: a survey of recent case law reveals that courts that take the plaintiff-focused individualistic view tend to deny class certification, while courts that embrace the defendant-focused societal view are more likely to certify a punitive damages class, all else being equal. Support for this theory is also found in courts' attitudes towards bifurcated trial management practices.

Part II is a rebuttal to the argument that *Williams* is a formidable constitutional obstacle to the punitive damages class action. Notwithstanding academic demurrers to the contrary, I argue that the societal conceptualization of punitive damages is not unconstitutional. Moreover, even if the "limited punishment" rationale for the Rule 23(b)(1)(B) limited fund punitive damages class appears nigh unworkable,[7] class certification is by no means foreclosed across the board. Within the two remaining categories of punitive damages

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illustrates the Court's rejection of deterrence theory . . . in the context of punitive damages. . . . [W]here harm to the class is individualized, punitive damages cannot be pursued as a class-wide remedy."); Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 433, 445–46 (2008) (concluding that *Williams* renders punitive damages class actions functionally impracticable, if not formally unconstitutional); *see also* Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845, 850 (2010) ("[P]revailing class action jurisprudence, integrated with the Court's punitive damage jurisprudence, is unlikely to support certification of a Rule 23(b)(3) punitive damage class. In addition, the Supreme Court is extremely unlikely to create an *Ortiz* exception for punitive damage classes."). Professor Thomas Colby sounded an even earlier (pre-*Williams*) pessimistic note. *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 664–65 (2003) ("[T]here are a number of significant impediments to the use of the class action device to resolve punitive damages claims arising out of a single course of conduct. . . . [E]ven where the defendant's conduct was identical with respect to all victims (which is often not the case), individual issues (including causation and the amount of both compensatory and punitive damages) will tend to predominate, again making a class action unworkable.").

7. *See infra* Part II.B.1.

class actions—Rule 23(b)(2) equitable relief class actions and Rule 23(b)(3) money damages class actions—the conceptualization of punitive damages as either individualistic or societal matters, and, indeed, likely determines the outcome of the certification question.

I conclude with a fortified belief and prediction that the future of the punitive damages class rests squarely on the viability of the societal conception of punitive damages. Finally, I provide the broad outlines of some reform possibilities to increase the likelihood that punitive damages classes will be certified.

I. SOCIETAL PUNITIVE DAMAGES AND CLASS CERTIFICATION

Whether courts conceptualize punitive damages as having an individualistic or societal purpose is key to how they decide the certification question. Courts taking the plaintiff-focused individualistic view tend to deny class certification, while courts embracing the defendant-focused societal view are more likely to certify a punitive damages class, all else being equal. The viability of the punitive damages class, in other words, depends upon the persuasiveness of the societal conception of punitive damages.

A. The Societal Purpose of Punitive Damages

Conceptually, punitive damages can be represented by the two-by-two matrix below, which disaggregates the purpose of punitive damages along two axes: individualistic versus societal and retributive versus deterrent. The category of individualistic punitive damages insists on the bipolar link between the particular defendant(s) and plaintiff(s) in the lawsuit; it relates the purpose of punitive damages as either retributive punishment (Quadrant I) or specific deterrence (Quadrant II) of the defendant only with respect to the harms inflicted upon the particular plaintiff(s) before the court. The category of societal punitive damages—those directed toward effectuating a broader public purpose—is comprised of retributive punishment on behalf of society (Quadrant III) or non-retributive general deterrence (Quadrant IV).

Figure 1. Punitive Damages Matrix

	Retributive	Deterrent
Individualistic	I	II
Societal	III	IV

Punitive damages have been awarded in circumstances best characterized as punishment on behalf of the entire society (Quadrant III) for particularly egregious behavior with wide-ranging effects.[8] This supra-compensatory remedy has also been used in the name of non-retributive general deterrence (Quadrant IV), to force an actor to internalize the full costs of the harms that it has inflicted upon groups—or classes—of individuals.[9]

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8. *See, e.g., In re* Simon II Litig., 211 F.R.D. 86, 104 (E.D.N.Y. 2002) ("[T]he punitive award can be said to constitute a punishment on behalf of society. . . ."), *vacated*, 407 F.3d 125, 135–36 (2d Cir. 2005) ("[P]unitive damages, 'which have been described as quasi-criminal, operate as private fines intended to punish the defendant and to deter future wrongdoing.'" (quoting Cooper Indus. v. Leatherman Tool Grp., 532 U.S. 424, 432 (2001))); *see also* Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 980–81 (2001) ("Punitive damages stand as a civil penalty for transgression of the social compact. . . . to penalize conduct that violates the social contract and injures society.").

9. There are several economic rationales for punitive damages. The primary economic rationale for supra-compensatory damages—itself traceable back more than a century to Jeremy Bentham, but not formalized in the specific context of punitive damages until recent decades—is optimal deterrence (or loss internalization): when compensatory damages alone will not induce an actor to take cost-justified safety precautions, then supra-compensatory damages are necessary to force the actor to internalize the full scope of the harms caused by his actions.

Alternative economic rationales—disgorgement of ill-gotten gains and enforcement of property rights—have been proposed to align the theory with the historical and conventional focus of punitive damages on intentionally wrongful behavior. The Calabresi-Melamed (1972) property rule/liability rule dichotomy provides one framework for choosing between the loss internalization (liability-rule) and gain elimination/voluntary market transfer (property-rule) models. For further elaboration, see Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and Doctrine, in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (Jennifer Arlen, ed., Kluwer, forthcoming 2013) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990336.

The basic economic model can be extended to the class action context:

> At first blush, it may appear that any societal compensatory justification for punitive damages largely dissolves in the context of a class action, at least assuming that all of the relevant harmed individuals are before the court. . . . [But] [w]e might consider whether a class of plaintiffs can itself serve as a proxy for society, or at least for a wider societal group.

Sharkey, *Societal Damages*, *supra* note 3, at 410, 413. *See also* McGovern, *supra* note 2, at 462–63 ("[A]nother possible role for a class action in punitive damages cases could materialize if a court adopted a separate rationale for punitive damages based upon economic arguments

B. Empirical Support of the Link Between Societal Punitive Damages and Class Certification

Empirical support for the thesis advanced here—that the conceptualization of punitive damages as societal or individualistic will dictate how a court decides certification questions—exists in the context of courts' treatment of bifurcation questions as well as certification decisions. I address bifurcation and certification decisions in turn.

1. Bifurcation Decisions

In bifurcated trial plans, punitive liability (and sometimes damages) is decided before individual compensatory damages; bifurcation is often proposed in conjunction with punitive classes as a superior trial management technique.

A pair of Equal Employment Opportunity Commission (EEOC) cases, which both were Rule 23(b)(2) class actions on behalf of a group of female employees alleging employment discrimination, provides an apt comparison.[10] In both, the EEOC sought compensatory and punitive damages, and both parties agreed to bifurcation of compensatory liability and damages.[11] The EEOC argued further that punitive liability and damages should be decided during the first (compensatory liability) stage, while the defendants insisted upon individual determinations of punitive liability and damages in phase two.[12] But there the similarities end. In *E.E.O.C. v. Outback Steakhouse*, the federal district court held that punitive liability (though not amount of damages) could be decided in the first stage;[13] the federal district court in *E.E.O.C. v. Sterling Jewelers Inc.*

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that damages for tortious conduct should be fully borne by the tortfeasor in order to achieve optimal societal deterrence.").

10. *Compare* E.E.O.C. v. Sterling Jewelers, 788 F. Supp. 2d 83, 84–85 (W.D.N.Y. 2011) (class of roughly 20,000 former and current female employees), *with* E.E.O.C. v. Outback Steakhouse, 576 F. Supp. 2d 1202, 1203 (D. Colo. 2008) (class of female employees in a three-state region). Note that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), may abrogate the class certification decisions in these cases, as they (like *Dukes*) involved Title VII employment discrimination claims and punitive damages. For discussion of *Dukes*, see *infra* notes 57–59 and accompanying text.

11. *See Sterling Jewelers*, 788 F. Supp. 2d at 85; *Outback Steakhouse*, 576 F. Supp. 2d at 1203.

12. *Compare Sterling Jewelers*, 788 F. Supp. 2d at 88, *with Outback Steakhouse*, 576 F. Supp. 2d at 1206. Defendants raised the Court's constitutional due process punitive damages cases, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), in support of their argument that punitive damages must be decided on an individual basis. *See Sterling Jewelers*, 788 F. Supp. 2d at 88–89. For an analysis of this rationale, see *infra* Part II.A.

13. 576 F. Supp. 2d at 1207.

reached the opposite conclusion, holding that punitive liability could not be assessed until the remedial phase (phase two).[14]

These differing outcomes are best explained by the two courts' respective conceptualizations of the nature or purpose of punitive damages. According to the *Outback Steakhouse* court, "'[t]he purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant'"; the court elaborated that "the focus of a punitive damages claim is 'not on the facts unique to each class member, but on the defendant's conduct toward the class as a whole.'"[15] This societal conceptualization of punitive damages trains its focus on the defendant's conduct that has caused widespread harm.

In sharp contrast, the *Sterling Jewelers* court embraced an individualistic notion of punitive damages and declined to resolve punitive liability and damages on a classwide basis in the first phase of the trial.[16] According to the court, "the highly individualized and subjective manner in which the discrimination is alleged to have occurred" meant that damages awards likely would vary with respect to each class member.[17] Therefore, any punitive damages decisions would need to be "determined as part of the fact-specific individual determinations made in Stage II."[18] The court cited *Williams* (and *State Farm v. Campbell*) in support of its individualistic conception of punitive damages.[19]

The close factual similarity between these two EEOC cases supports my claim that the two courts' different conceptualizations of the nature of punitive damages drove the disparate bifurcation decisions. Moreover, it is this same conceptual difference that

14. 788 F. Supp. 2d at 92.

15. 576 F. Supp. 2d at 1205 (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal. 2004), *aff'd en banc* 603 F.3d 571 (9th Cir. 2010), *rev'd* 131 S. Ct. 2541 (2011)). Given that *Williams* postdates *Outback Steakhouse*, one might question whether the court would hold steadfast to this societal conceptualization of punitive damages in light of the Supreme Court's embrace of the competing individualistic retributive conceptualization. However, the *Outback Steakhouse* court reasoned that its decision was consistent with *Campbell* because the amount of punitive damages, and therefore the relationship between compensatory and punitive awards to individuals, would not be decided until the second stage of the litigation. *See id.* at 1206–07. Given the federal district court's reasoning that the societal conception withstood *Campbell*, it is not too far of a stretch to predict that it would likewise withstand *Williams*.

16. 788 F. Supp. 2d at 92.

17. *Id.* at 91.

18. *Id.* at 92.

19. *Id.* at 90 ("[T]he EEOC's proposed scheme of assessing punitive damages on a classwide basis before any determination is made as to the actual harm caused by that policy is inconsistent with the principles articulated in *State Farm* and *Philip Morris USA*.").

explains courts' attitudes towards certification of punitive damages classes.

2. Certification Decisions

A survey of cases reveals that courts' conceptualization of punitive damages—classifying their underlying purpose as either individualistic or societal—is dispositive on the certification question.

In *Hilao v. Estate of Marcos*,[20] the Ninth Circuit embraced a distinctly societal conception of punitive damages. The court upheld the certification of a Rule 23(b)(3) money damages class whereby compensatory and punitive damages would be assessed using a statistical sample, without individualized hearings.[21] The central question the court posed in conducting its constitutional review of the excessiveness of the punitive damages award was "'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'"[22] This is a societal conception of punitive damages because the punitive award would not be limited to the harms incurred by the particular plaintiffs before the court.

Certification of equitable relief class actions under Rule 23(b)(2) presents an interesting twist for punitive damages classes. In order for punitive damages to be certified as part of an equitable relief class action under Rule 23(b)(2), such damages would have to be "incidental" to the injunctive or declaratory relief sought.[23] In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that backpay could not be characterized as incidental given the "individualized" nature of such relief.[24]

The Court's reasoning with respect to backpay could apply to punitive damages to the extent that such claims are considered "individualized monetary claims."[25] Courts are divided on this question. In *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit held that punitive damages could not be considered incidental to equitable

20. 103 F.3d 767 (9th Cir. 1996).

21. *See id.* at 785–87.

22. *Id.* at 780 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993)).

23. *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

24. *See id.*

25. *Id.* at 2558. The Court states that individualized monetary claims can only be certified under Rule 23(b)(3), where additional procedural protections, including predominance, superiority, mandatory notice, and opt-out rights, apply. *See id.* at 2558–59.

relief.[26] In so holding, the *Allison* court hewed closely to the individualistic, plaintiff-oriented conceptualization of punitive damages: "Punitive damages cannot be assessed merely upon a finding that the defendant engaged in a pattern or practice of discrimination. Such a finding establishes only that there has been general harm to the group and that injunctive relief is appropriate."[27]

Courts both within the Fifth Circuit and elsewhere have embraced this individual-oriented approach.[28] For instance, an Arkansas federal district court rejected classwide punitive damages in a Rule 23(b)(2) class in *Nelson v. Wal-Mart Stores, Inc.*[29] Plaintiffs, who argued that Wal-Mart had discriminated against African-Americans in recruiting and hiring truck drivers, tried to persuade the court that the focus of the punitive damages inquiry should be the defendant's misconduct,[30] implicitly pushing a societal view of punitive damages. But the court demurred, insisting that "[i]n most cases, punitive damages are an individualized, and not a classwide, remedy."[31] Relying on *Williams*,[32] the court elaborated: "an award of punitive damages often must include an inquiry into each plaintiff's individual circumstances in order to determine the amount of punitive damages awardable to that plaintiff."[33] The court thus held that individualized determinations would be necessary "to determine the extent of the harm caused by [the defendant's] conduct" given that it was highly unlikely that each class member had suffered the same harm from the defendant's allegedly racially discriminatory

26. 151 F.3d 402, 416–18 (5th Cir. 1998). The court reasoned that incidental damages must "flow directly from liability to the class as a *whole* on the claims forming the basis of the injunctive or declaratory relief," cannot depend "in any significant way on the intangible, subjective differences of each class member's circumstances," and should not "require additional hearings to resolve the disparate merits of each individual's case." *Id.* at 415.

27. *Id.* at 417.

28. *See, e.g.*, Lemon v. Int'l Union of Operating Eng'rs, Loc. 139, 216 F.3d 577, 581 (7th Cir. 2000) (applying *Allison* and reiterating that "to win punitive damages, an individual plaintiff must establish that the defendant possessed a reckless indifference to the plaintiff's federal rights—a fact-specific inquiry into that plaintiff's circumstances"); E.E.O.C. v. Int'l Profit Assocs., Inc., No. 01 C 4427, 2007 WL 3120069, at *10–11 (N.D. Ill. Oct. 23, 2007) (adopting *Allison* and *Lemon*'s plaintiff-focused conceptualization of punitive damages and requiring individualized inquiries into each class member's entitlement to punitive damages); Colindres v. Quietflex Mfg., 235 F.R.D. 347, 381 (S.D. Tex. 2006) ("As the court clarified in *Allison*, the recovery of punitive damages in Title VII cases requires 'individualized and independent proof of injury to, and the means by which discrimination was inflicted upon, each class member.'" (quoting *Allison*, 151 F.3d at 420)).

29. *See* 245 F.R.D. 358, 376–78 (E.D. Ark. 2007).

30. *See id.* at 376. Plaintiffs emphasized the centrality of a common defendant strategy given that the hiring practices had all been developed at corporate headquarters and initial screening occurred through headquarters as well. *See id.* at 363–64.

31. *Id.* at 376.

32. Philip Morris USA v. Williams, 549 U.S. 346, 357 (2007).

33. *Nelson*, 245 F.R.D. at 376.

practices.[34] The *Allison* approach has become the prevailing position: punitive damages are individualistic and, as such, preclude class certification.

But there are some notable exceptions. In *Palmer v. Combined Insurance*, an Illinois federal district court judge explained:

> While I recognize that in most cases, an award of punitive damages requires a fact-specific inquiry into an individual plaintiff's circumstances . . . when the focus is on the defendant's conduct, as opposed to the class members' harms, and the relief is sought for the class as a whole, I find that such individualized proof is not *necessarily* required.[35]

Note here the pivotal moment when the judge switches his focus to the defendant's conduct and thereby adopts a societal conceptualization of punitive damages. Similarly, in *E.E.O.C. v. Dial Corp.*, the same Illinois federal court embraced classwide determination of punitive damages.[36] Highlighting the deterrent function of punitive damages, the court singled out "the defendant's conduct" as "the most important indicium of the reasonableness of the punitive damages award . . . ."[37]

Three years ago, I predicted that "[t]he ability to certify a punitive damages class going forward rests upon a distinctly societal notion of punitive damages."[38] The lower courts' track record to date vindicates my claim.

II. OSTENSIBLE BARRIERS POSED BY *PHILIP MORRIS V. WILLIAMS*

To what extent has the Supreme Court's punitive damages jurisprudence impacted the punitive damages conceptual framework I have put forward? More specifically, has *Williams* dealt a crippling blow to the punitive damages class? According to prevailing wisdom, *Williams* dramatically alters the punitive damages landscape (represented in the matrix in Part I.A. above) by prohibiting the entire category of societal punitive damages, thereby wiping out Quadrants III and IV.[39]

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34. *Id.* at 377.

35. 217 F.R.D. 430, 438 (N.D. Ill. 2003).

36. *See* 259 F. Supp. 2d 710, 712 (N.D. Ill. 2003).

37. *Id.* at 715 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).

38. Sharkey, Exxon, *supra* note 4, at 50.

39. That said, some commentators have argued that the rationale in *Williams*, far from foreclosing the punitive damages class, calls out for it. *See, e.g.*, Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We*

By way of background, in a trio of cases—*State Farm v. Campbell*, *BMW v. Gore*, and *Philip Morris USA v. Williams*—the Supreme Court reined in excessive punitive damages while addressing the vexing problem of "multiple punishment."[40] Each case involved a single plaintiff who sought to punish a defendant for widespread harms affecting myriad individuals, each of whom could later bring his own action for punitive damages against the same defendant. The defendant thus faced the prospect of being punished again and again for the same misconduct.[41] The *Williams* Court's response was to insist that the defendant could only be punished for the specific harms suffered by the particular plaintiff in the case; the jury could not punish the defendant for harms inflicted upon others, whom the Court characterized as "strangers to the litigation."[42] Specifically, although the *Williams* Court said that evidence regarding a defendant's widespread harms could be relevant to the degree of reprehensibility of the defendant's conduct, judges had a responsibility to guard against the possibility that juries would punish the defendant for harms inflicted on those other than the named plaintiff.[43]

Can Get There from Here, 2 CHARLESTON L. REV. 407, 421 (2008) ("The obvious solution to the 'punishment for harm to plaintiffs only' dictate of *Philip Morris* is to bring more plaintiffs before the court . . . ."); James M. Underwood, *Road to Nowhere or Jurisprudential U-Turn? The Intersection of Punitive Damage Class Actions and the Due Process Clause*, 66 WASH. & LEE L. REV. 763, 802 (2009) (arguing that the punitive damages class action responds to *Williams* "[b]y converting other victims of the tortfeasor's misconduct from 'strangers' into class members").

40. Philip Morris USA v. Williams, 549 U.S. 346, 356 (2007) ("Philip Morris asked the trial court to tell the jury . . . '*you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own* . . . .'") (emphasis added); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("[Punishment for harm to others] creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *Gore*, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.").

41. *See Williams*, 549 U.S. at 350 ("Philip Morris pointed out that the plaintiff's attorney had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been.'"); *Campbell*, 538 U.S. at 420 ("From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities."); BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627 (Ala. 1994) ("It seems apparent from the record that the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)."), *rev'd*, 517 U.S. 559 (1996).

42. 549 U.S. at 353.

43. *Id.* at 355 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . . Yet . . . a jury may not go further than this and use a

A. The Persistence of Societal Punitive Damages

In the wake of *Williams*, the late Professor Richard Nagareda led the charge against the societal conception of punitive damages:

> The constitutional message in *Williams*—that punitive damages are ultimately about punishment for the wrong done to the plaintiff at hand—gives a considerable nod to what [is] described as plaintiff-focused views in torts literature. . . . By casting punitive damages ultimately as punishment vis-à-vis the plaintiff—not anyone else—the [*Williams*] Court arguably constitutionalizes a kind of divisible characterization for that remedy.[44]

But this conventional interpretation over-reads *Williams*, which is more accurately read to foreclose punitive damages as societal *punishment* (Quadrant III) while remaining silent as to punitive damages as a vehicle for non-retributive societal *deterrence* (Quadrant IV). It cannot be gainsaid that the *Williams* Court implicitly adopted the individualistic retributive conception of punitive damages (Quadrant I). It seems equally clear that the Court foreclosed adopting a societal retributive conception of punitive damages as punishment on behalf of society or a wider group that extends beyond the individual named plaintiff (Quadrant III).[45]

That said, the Court left untouched the non-retributive deterrence conception of punitive damages (Quadrants II and IV). The Court did not "constitutionalize" the individual retributive punishment conception of punitive damages (Quadrant I).[46] To the

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punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.").

44. Nagareda, *supra* note 6, at 1136. *See also* Paul B. Rietema, *Reconceptualizing Split-Recovery Statutes:* Philip Morris v. Williams, *127 S. Ct. 1057 (2007)*, 31 HARV. J.L. & PUB. POL'Y 1159, 1166 (2008) (suggesting *Williams* signals the demise of societal punitive damages). Sheila Scheuerman similarly reads *Williams* to foreclose the societal view of punitive damages. *See* Scheuerman, *supra* note 6, at 932 ("[T]he Supreme Court has premised its [punitive damages] due process theory on a one-on-one model of adjudication that focuses on the parties' relationship to one another and not the impact on non-parties or larger social issues.").

45. The Court signaled its rejection of societal retribution as the basis for punitive damages in its earlier decision in *Campbell*: "A defendant should be punished for the conduct that harmed the *plaintiff*, not for being an unsavory individual or business." 538 U.S. at 423 (emphasis added).

46. *See* Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams: *The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 477 (2008). *But see* Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of* Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 352 (2008) ("[I]n reading the Court's decisions, it

contrary, the Court echoed its oft-repeated federalism-infused pronouncement that a court's constitutional review of the excessiveness of punitive damages should look first to "a *State's* legitimate interests in punishing unlawful conduct and deterring its repetition."[47] Thus, to withstand *Williams*'s constitutional scrutiny, plaintiffs will have to demonstrate that punitive damages' non-retributive deterrence purpose is a legitimate state interest.[48]

B. Repercussions for Certification Decisions

Class actions are under attack. Even apart from *Williams*, the Supreme Court in recent years has significantly curtailed prospects for certifying Rule 23(b)(1)(B) limited fund classes or Rule 23(b)(2) equitable relief classes. The question, then, is whether and to what extent *Williams* solidifies or tightens the Court's restrictions in the realm of punitive damages class actions.

Several scholars have characterized *Williams* as the "nail in the coffin" for the punitive damages class action.[49] But this view stems from an erroneous over-reading of *Williams* (as argued above). Instead, to the extent that punitive damages embody a societal deterrence objective, a punitive damages class should be *more*—not less—prone to certification than any compensatory damages class, which is more apt to hinge on individualistic differences among plaintiffs.

That said, *Williams* does strengthen the already solid case against certification of a Rule 23(b)(1)(B) limited fund punitive damages class action, at least to the extent that the latter rests on a societal retributive rationale, which is no longer tenable in the wake of *Williams*. However, foreboding claims of the deaths of Rule 23(b)(2) and Rule 23(b)(3) punitive damages classes—so long as parties and courts resist characterization of punitive damages as an exclusively individualistic remedy—are premature.

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seems far more likely that the Court was going beyond the descriptive; it was itself establishing the *constitutionally* legitimate purposes of th[e] historically state-defined remedial device [of punitive damages].") (emphasis added); *supra* note 44 and accompanying text.

47. *Williams*, 549 U.S. at 352 (emphasis added) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996)); *accord Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 587 (Breyer, J., concurring); *see also* Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449, 470 (2010) [hereinafter Sharkey, *Federal Incursions*] ("[E]ven as the U.S. Supreme Court intervenes to scrutinize punitive damages awarded under state law, it always begins with an opening salvo of deference to the 'state interests' served by punitive damages. Nothing in *Williams* changes this key federalism point . . . .").

48. *See supra* note 9.

49. *See* sources cited *supra* note 6.

1. Rule 23(b)(1)(B) Limited Fund Class Actions

The conventional take on *Williams* is that, in combination with *Ortiz v. Fibreboard Corp.*,[50] an earlier class action decision, it dealt a fatal blow to the punitive damages class action. In *Ortiz*, the Supreme Court "clamp[ed] down significantly on adventuresome applications of Rule 23(b)(1)(B) [limited fund class actions], and signal[ed] strong bias against class certification and in favor of individual litigation in future mass torts."[51] Although the Supreme Court in *Ortiz* did not definitively close the door to Rule 23(b)(1)(B) punitive damages classes, the Court strongly suggested that it would not construe Rule 23(b)(1)(B) as capacious enough to embrace the limited fund punitive damages class action.[52]

Prior to *Ortiz*, before the Alaska federal district court, defendant Exxon requested and was granted certification of a mandatory non-opt-out punitive damages class of more than thirty-two thousand plaintiffs—commercial fishermen, Native Alaskans, and landowners—in *Exxon Shipping Co. v. Baker*.[53] This Rule 23(b)(1)(B) "limited fund" class was premised on a "limited punishment" theory: namely, that constitutional due process imposes an upper limit on the total aggregate amount of punitive damages that a defendant

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50. 527 U.S. 815 (1999).

51. Sharkey, Exxon, *supra* note 4, at 49–50. *See generally* Mullenix, *supra* note 6, at 872 ("[T]he [*Ortiz*] Court set forth three criteria for certification of a limited-fund class, requiring proof of: (1) the existence of an actual limited or insufficient fund, (2) use of the entire inadequate fund to pay all the claims in the class action, and (3) equitable treatment of all class claimants.").

52. *See generally* Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 957 (2001) ("The limited fund concept that animates Rule 23(b)(1)(B) and the demand in *Ortiz* for proof of that limit make sense only for funds that truly would be limited in the context of actual litigation, absent the existence of the class action."). For further exploration of the debate among commentators regarding the benefits of the limited fund punitive damages class, compare, for example, Aileen L. Nagy, Note, *Certifying Mandatory Punitive Damages Classes in a Post-*Ortiz *and* State Farm *World*, 58 VAND. L. REV. 599, 625–28 (2005) (arguing that the Supreme Court should make an exception to *Ortiz* to certify Rule 23(b)(1)(B) punitive damages classes because such an exception would benefit: plaintiffs, who no longer would have to engage in a race to the courthouse in order to stake out a punitive damages claim before the due process limit on punitive damages had been reached; defendants, who would achieve final resolution or global peace; and the judicial system, which would achieve an efficient and comprehensive resolution), with, for example, Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 WIS. L. REV. 563, 590 ("[L]imited-punishment classes provide plaintiffs with no additional benefit in exchange for sacrificing their right to opt out and bring their own litigation. Instead, the real winners are (a) defendants—who can settle a class action on the cheap and pay plaintiffs an artificially low level of punitive damages, and (b) class counsel—who can maximize their attorneys' fees by preventing individual class members from pursuing their claims outside of the class action.").

53. 554 U.S. 471, 479 (2008). For a more detailed account, see generally Sharkey, Exxon, *supra* note 4, at 46–51.

could face for a single act or course of conduct.[54] In the wake of *Exxon Shipping*, Professor Francis McGovern optimistically proclaimed that the decision "provides at least one scenario in which there can be a punitive damages class action. . . . Looking to the future, there may be circumstances similar to Exxon that will occur."[55]

Nonetheless, the prospects for limited fund punitive damages classes are limited. As even the federal district court in *Exxon Shipping* conceded, the "singular nature of the spill" created a "unique and compelling" case for the certification of a mandatory non-opt-out punitive damages class.[56] Nor does the Supreme Court's failure to disturb the mandatory Rule 23(b)(1)(B) punitive damages class in *Exxon Shipping* provide much of a glimmer of hope given that the issue of the punitive damages class certification was not before the Court.

Finally, to the extent that the limited fund punitive damages class action rests on a "limited punishment" rationale, *Williams* presents a formidable additional obstacle. As explained above, although the *Williams* Court did not constitutionalize an exclusively individualistic conception of punitive damages, it did foreclose a societal retributive conception of punitive damages (Quadrant III). The

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54. The federal district court accepted Exxon's argument that "due process places a limit on punitive damages and, in substance, creates a limited fund from which punitive damages may be awarded." In re Exxon Valdez, No. A-89-095-CV (D. Alaska, March 8, 1994), Order No. 180 Supplement at 9 (quoted in Sharkey, Exxon, *supra* note 4, at 47–48 & n.110).

Subsequently, the plaintiffs in *In re Simon II Litigation* invoked the "limited punishment" theory against the vociferous objection of the tobacco defendants. Judge Jack Weinstein certified a mandatory non-opt-out punitive damages-only class on this theory, 211 F.R.D. 86, 110–11 (E.D.N.Y. 2002), but his decision was overturned by the Second Circuit, which held that a Rule 23(b)(1)(B) limited fund based on the limited punishment theory was "not easily susceptible to proof, definition, or even estimation, by any precise figure." *In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005).

Certification of a mandatory non-opt-out punitive damages class based on the limited punishment theory was successfully invoked (though subsequently voluntarily abandoned by plaintiffs in the interest of judicial efficiency) in *Nationwide Mutual Insurance Co. v. O'Dell*, No. 00-C-37, 2006 WL 6367367, ¶ 53–65 (W. Va. Cir. Ct. June 2, 2006), in which the court warned: "Absent such certification, a scenario could arise where late-filing class members are unable to collect punitive damages because the available pool of punitive damages, as limited by due process concerns espoused by *Campbell*, has been drained by earlier-filing class members." *Id.* ¶ 63.

55. McGovern, *supra* note 2, at 445. McGovern provides a list of relevant factors leading to the certification of the mandatory non-opt-out punitive damages class in *Exxon Shipping*, including that there was a single tortious event, the goal of certification was to prevent overdeterrence, the defendant moved for certification, and the class was mandatory. *Id.*

56. Sharkey, Exxon, *supra* note 4, at 48 (quoting *In re* Exxon Valdez, No. A-89-095-CV (D. Alaska, Mar. 8, 1994), Order No. 180 Supplement at 10 ("The reasons for certifying a punitive damages class under a 'limited punishment' theory are, perhaps, more unique and compelling in this case than in any other. Unlike the majority of mass tort class actions, this case involves an unusual convergence of identity of occurrence, law, and fact.")).

"limited punishment" rationale for the limited fund punitive damages class—which rests on the premise that there is an outer limit on the amount of punishment on behalf of society or a wider group that extends beyond the individual plaintiff in a case—is thus not viable.

2. Rule 23(b)(2) Equitable Relief Class Actions

Wal-Mart Stores, Inc. v. Dukes[57] presents a more recent hurdle to certification of class actions.[58] Of particular relevance to this Article, the *Dukes* Court narrowed the possibility for certification of classes bringing individualized monetary claims under Rule 23(b)(2). The Court held that individualized relief, such as claims for backpay, could not be combined with classwide relief under Rule 23(b)(2); instead, such claims should be brought under Rule 23(b)(3).[59]

Did the Court thereby curtail the prospects for certification of punitive damages classes under Rule 23(b)(2)? If one reads *Williams* to foreclose all societal conceptions of punitive damages—based on either retributive punishment (Quadrant III) or general deterrence (Quadrant IV)—then, taken together with *Dukes*, the Court has seemingly dealt a one-two punch to the certifiability of the punitive damages class. The argument proceeds as follows: punitive damages, like backpay, cannot be certified in mandatory classes because they raise individualized issues.

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57. 131 S. Ct. 2541 (2011).

58. *Dukes* mandates that to demonstrate "proof of commonality" (a required showing for class certification), plaintiffs must show that class certification "will produce a common answer" to the common question. *Id.* at 2552. *Dukes* changed the commonality standard's focus from whether there are judicial efficiencies to be found in questions common to the class, to whether the common claims can be resolved en masse:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Although it is still unclear whether *Dukes* is binding outside of the Title VII or mandatory class action contexts, its holding has the potential to jeopardize the certification of many class actions. According to Professor Robert Klonoff, "The full reach of *Dukes* remains to be seen, and not surprisingly, the results are mixed. . . . [E]arly indications suggest a greater impact in (b)(2) cases than in (b)(3) cases." Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 53–54), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985.

59. *Dukes*, 131 S. Ct. at 2558.

But this argument rests on the misguided over-reading of *Williams* discussed above. It wrongly presumes that *Williams* precludes the societal deterrent conception of punitive damages (Quadrant IV). Quadrant IV does not hinge on individualized issues and, thus, leaves open an avenue for certification of punitive damages as incidental to equitable relief. Even in the wake of *Dukes* and *Williams*, courts can find a way to embrace the societal deterrent conceptualization of punitive damages and to certify a Rule 23(b)(2) punitive damages class.

My view finds support in *Ellis v. Costco Wholesale Corp.*,[60] in which the Ninth Circuit remanded for reconsideration a Rule 23(b)(2) punitive damages class certification in light of *Dukes*.[61] In so doing, the court reaffirmed its embrace of the societal conceptualization of punitive damages: "[Punitive damages] claims focus on the conduct of the defendant and not the individual characteristics of the plaintiffs."[62] For that reason, the court suggested that certification of a Rule 23(b)(2) punitive damages class might still be viable post-*Dukes*.[63]

On remand, the federal district court agreed. According to the court, "given the nature of Plaintiffs' claims alleging a pattern or practice of discrimination, the punitive damages inquiry necessarily focuses on Defendant's conduct with respect to the class as a whole, rather than any individual employment decisions with respect to specific employees."[64]

Ellis strongly suggests that so long as the societal understanding of punitive damages persists, certification of Rule 23(b)(2) punitive damages classes remains possible. Conversely, courts that characterize punitive damages as individualized monetary relief will likely

60. 657 F.3d 970 (9th Cir. 2011).

61. The court held that the district court failed to engage in the "rigorous analysis" that *Dukes* requires in order to find the commonality requirement satisfied. *Id.* at 984.

62. *Id.* at 987 (quoting Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 643 (N.D. Cal. 2007) *aff'd in part, vacated in part*, 657 F.3d 970).

63. *See id.* ("The [district] court may consider whether punitive damages are an allowable 'form[ ] of incidental monetary relief' consistent with the Court's interpretation of 23(b)(2) because they do not require an individual determination.").

64. Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 543 (N.D. Cal. 2012). The court held that "while the availability of punitive damages should be adjudicated in Stage One of the trial, determination of the aggregate amount and individual distribution of punitive damages should be reserved for Stage Two." *Id.* at 542. As the court explained, "[s]uch an arrangement will take advantage of the bifurcated trial procedure while safeguarding Defendant's right to ensure that any punitive damages award remains tethered to the compensatory damages actually awarded in Stage Two, consistent with *State Farm*." *Id.* at 543.

deny certification.[65] Thus, in the face of *Williams*, my central thesis remains valid.

3. Rule 23(b)(3) Money Damages Classes

The Ninth Circuit's ringing endorsement of the Rule 23(b)(3) punitive damages class in *Hilao*[66] pre-dated the Supreme Court's trio of constitutional cases reining in punitive damages awards. Moreover, *Hilao* is the only Rule 23(b)(3) punitive damages class action that has survived all the way from certification to a trial verdict.[67] So, here too, it is fair to ask whether *Williams* poses a barrier to certification of Rule 23(b)(3) punitive damages classes.

I argue that it does not. My position finds support in *Iorio v. Allianz Life Insurance Co. of North America*.[68] There, a California federal district court certified a Rule 23(b)(3) punitive damages class action brought by a group of senior citizens seeking to recover for harms stemming from the defendant's allegedly fraudulent scheme that tricked them into purchasing deferred annuities.[69] The defendant relied on *Williams* in moving to decertify the class.[70] The court rejected the challenge, reasoning that punitive damages would be awarded based on the defendant's misconduct (thereby considering harms to others) and, accordingly, individual hearings to determine punitive damages were not necessary.[71] Moreover, the court held that an appropriate punitive-compensatory ratio could be set based on the compensatory damages awarded to subclasses and on the overall actual or potential harm caused by the defendant's misconduct. The court also noted that it could adjust

65. *See, e.g.*, Mothersell v. City of Syracuse, 5:08-CV-615 NAM/TWD, 2013 WL 936454, at *12 (N.D.N.Y. Mar. 8, 2013) ("Because the amended complaint seeks compensatory and punitive damages as well as injunctive and declaratory relief, the instant action cannot proceed as a Rule 23(b)(2) class action. As the Supreme Court made clear in *Wal-Mart*, 'individualized monetary claims belong in Rule 23(b)(3).'"); Scott v. Family Dollar Stores, Inc., No. 3:08CV540, 2012 WL 113657, at *4 (W.D.N.C. Jan. 13, 2012) ("[P]laintiffs cannot state class claims for *individualized* monetary relief, such as back pay, punitive damages, and liquidated damages . . . because the Supreme Court unanimously held in *Dukes* that such relief is not available under Rule 23(b)(2).") (emphasis added).

66. *See supra* text accompanying notes 20–22.

67. Mullenix, *supra* note 6, at 860 ("*Hilao*, then, remains the sole example of a 23(b)(3) class action for compensatory and punitive damages that was certified, actually tried, and resulted in quantifiable damages to the class claimants.").

68. *See* No. 05 CV 633 JLS (CAB), 2009 WL 3415703 (S.D. Cal. Oct. 21, 2009).

69. *Id.* at *1.

70. *Id.* at *4.

71. *Id.* at *6.

classwide punitive damages to comply with constitutional limits, as the Supreme Court had done in *Exxon Shipping*.[72]

In keeping with my central thesis, it remains the case post-*Williams* that a court's recognition of a societal conception of punitive damages can anchor certification of Rule 23(b)(2) and (b)(3) punitive damages classes.

C. "Strangers to the Litigation"

I address one final ostensible obstacle that *Williams* poses to the punitive damages class. In her takedown of the punitive damages class action, Professor Linda Mullenix argues that, because absent class members are not technically "joined" in a class action, but rather are merely "represented," they are strangers to the litigation and therefore "properly characterized as nonparties."[73] On Mullenix's account, any punitive damages award based on harm to absent class members violates *Williams*'s directive against punishing the defendant for harm to nonparties.[74] Mullenix's argument goes too far; her reasoning, taken to its logical conclusion, would undermine the constitutionality not only of punitive damages classes, but of all class actions.[75]

Albeit unnamed, absent class members are not "strangers to the litigation." An award of punitive damages to a class is based on harm to the *class* (each member of which is a party or has some aspects akin to formal parties) as opposed to harm to *nonparties*. For certain significant purposes, absent class members are treated as parties. They possess (admittedly limited) rights to participate in the class action—for example, by objecting—or exit, and they do not need to intervene formally as parties in order to appeal decisions on the basis of objections actually raised before the trial court.[76] It would not be anomalous, therefore, for absent class

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72. *Id.* at *7. After certification of the class in *Iorio*, the case settled. Notice of Motion & Motion for Preliminary Approval of Proposed Class Action Settlement & Related Orders at 1, Iorio v. Allianz Life Ins. Co. of N. Am., No. 05 CV 633 JLS (CAB), 2009 WL 3415703 (S.D. Cal. Oct. 21, 2009).

73. Mullenix, *supra* note 6, at 879, 882.

74. *See id.* at 882.

75. *See* Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 27 REV. LITIG. 9, 29 (2007) ("The only real plaintiffs are the class representatives. If the Due Process Clause does not permit a court to impose a damage award or penalty on behalf of 'persons who are not before the court,' then it would appear to invalidate class action lawsuits.") (footnote omitted).

76. *See, e.g.*, Devlin v. Scardelletti, 536 U.S. 1, 1, 6–14 (2002).

members to be treated as parties for the purpose of *Williams*'s due process analysis.

Even were absent class members considered nonparties, that would not mean that they are "strangers to the litigation." There is a significant difference between the special treatment of absent class members and the treatment of true nonparties—or strangers. *Williams* itself is an example: other Oregonian smokers seeking punitive damages would in no sense be precluded from seeking their own punitive awards following Williams's favorable verdict on punitive damages, but they most certainly would have been precluded had they been included as absent class members in the *Williams* litigation. Absent class members' punitive claims are therefore before the court because their rights are being adjudicated at the same time as the rights of the named representatives.

The case law, moreover, explicitly rejects arguments that unnamed class members are legal strangers. In *Iorio*, the federal district court rebuffed the defendant's argument that *Williams* prohibits awarding punitive damages on a representative basis because unnamed class members are legal strangers from one another.[77] The court explained:

> In the present case . . . the non-representative class members who received notice and did not opt out *are* parties to the litigation. Even though they may be absent from trial, any punitive damages will be awarded based on the harm done to those members, not to strangers or those whose interests are not before the court. This is illustrated by the requirement that class counsel is bound to represent all class members' interests, not just those of the representatives.[78]

A West Virginia state court rejected a similar argument that *Williams* foreclosed the award of punitive damages to unnamed class members.[79] As in *Iorio*, the court held that unnamed class members were parties to the litigation, unlike the "nonparties" or "strangers to the litigation" whose harm the punitive damages award in *Williams* redressed.[80]

Thus, *Williams* does not close the door on certification of punitive damages classes.

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77. *See* No. 05 CV 633 JLS (CAB), 2009 WL 3415703, at *5 (S.D. Cal. Oct. 21, 2009).

78. *Id.*

79. Tawney v. Columbia Natural Res., LLC, No. 03-C-10E, 2007 WL 5539870, slip op. at 93a, 120a (W. Va. Cir. Ct. June 27, 2007).

80. *Id.* at 94a–95a.

CONCLUSION: REFORM POSSIBILITIES

Given the formidable barriers to class certification in general, the portrait depicted above does not, by any stretch of the imagination, present an optimistic future for the punitive damages class. It does, however, shed light on a hitherto underexplored aspect of punitive damages certification, finding that, all else being equal, courts are more likely to certify punitive damages class actions when they adopt a societal, as opposed to individualistic, conception of punitive damages.

I have called into question the simple conclusion that *Williams*, standing alone, sounds the death knell for punitive damages classes. To be sure, *Williams* foreclosed certification of Rule 23(b)(1)(B) limited fund punitive damages classes based upon a societal retributive theory of punitive damages (i.e., Quadrant III). However, *Williams* does not meaningfully obstruct certification of punitive damages classes—either equitable relief class actions under Rule 23(b)(2) or money damages class actions under Rule 23(b)(3)—based on a societal, deterrent conceptualization of punitive damages (i.e., Quadrant IV).

My central claim is that, to the extent that any prospects exist for punitive damages classes under either Rule 23(b)(2) or Rule 23(b)(3), the fate of these classes' certifications rises or falls on whether courts conceptualize punitive damages as societal or individualistic.

If my understanding holds, there are several reform possibilities to increase the likelihood that punitive damages classes will be certified. State legislatures could affirmatively defend punitive damages based on under-enforcement and under-deterrence rationales.[81] For example, states could enact a statutory multiplier for certain torts based on the likelihood of under-detection—the grounds for which would, ideally, be expressly stated in a statute's text or preamble, or at least in reported legislative history. Such state legislative measures, moreover, would likely withstand constitutional scrutiny under *Williams*, given that the U.S. Supreme Court reaffirms the primacy of a state's role in defining the legitimate purposes of punitive damages.[82]

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81. *See supra* note 9.

82. *See* Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007). *See also* Sharkey, *Federal Incursions*, *supra* note 47, at 478 ("To date, states have not pressed non-retributive punishment rationales for punitive damages. But if a state were to articulate a societal compensatory or deterrence purpose in enacting a statutory multiplier for certain torts, or a split-recovery scheme (or a combination of both), the Court would be hard-pressed to strike down these legislative enactments as unconstitutional.").

Alternatively (and somewhat more radically), given courts' ad hoc consideration of the individualistic versus societal conception of punitive damages in light of the particulars of the case before them, the courts' analysis of this dimension might become more predictable and reliable if it were built into the conceptual framework for Rule 23 certification decisions when a punitive damages class is at issue. Courts, relying on their interpretations of the underlying state law policies undergirding punitive damages, could develop interstitial common law standards, identifying factual situations where under-detection, under-enforcement, or societal deterrence prerogatives predominate.

Would the Rules Enabling Act (the statute that authorizes the Federal Rules of Civil Procedure and mandates that procedural rules "shall not abridge, enlarge, or modify any substantive right"[83]) stand in the way of such reform possibilities? Two prominent procedural scholars, Professors Stephen Burbank and Tobias Wolff, have argued persuasively that, properly understood, the Rules Enabling Act not only permits—but actually requires—consideration of the relationship between procedural tools and the underlying liability policies that they seek to carry into effect. In particular, they argue:

> [C]ourts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of that underlying law. Rule 23 is merely the mechanism for carrying an aggregate proceeding into effect when the underlying law supports that result.[84]

Their view echoes that of Professor David Rosenberg, who likewise urges federal courts (and the U.S. Supreme Court in

83. *See* 28 U.S.C. § 2072(b).

84. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PENN. L. REV. 17, 21 (2010). Moreover, to the extent that state legislatures and courts have not had occasion to offer guidance concerning the impact and desirability of an aggregate remedy on liability and regulatory goals, Burbank and Wolff urge that "a federal court must necessarily rely upon its best judgment—informed by a combination of existing statements of state liability policy and general principles of class adjudication—as to the direction in which state authorities would move the law." *Id.* at 67. *See also* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 35–36) ("When judges must determine whether to constrain or authorize expansive and unprecedented forms of litigation in class or mass tort adjudication, they can use the goals of the underlying substantive law in the disputes before them as guideposts for their decisions.").

particular) to appreciate that state tort law causes of action may have collectivized (in addition to individualized) functions.[85]

The thrust of these scholars' arguments supports the two proposed tracks of reforms. First, state legislatures and courts could affirmatively define the collectivized, societal rationale for punitive damages. Second, federal courts—in the absence of definitive guidance from authoritative sources on state substantive law—could consider the underlying societal rationale for punitive damages in the course of their certification decisions. To do so would not only be permitted, but indeed warranted, by the Rules Enabling Act.

85. *See* David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1874 n.10 (2002) ("[D]eterrence and insurance have been the express justifications for products liability generally and liability for asbestos exposure specifically. . . . The *Amchem* Court's analytic defaults must therefore include its unexamined, not to mention unsubstantiated, assumption that state "substantive" tort law (as enforced under the Rules Enabling Act) commands federal trial courts to individualize liability and compensation regardless of the deterrence- and insurance-defeating consequences.").